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Supreme Court of the United States

October Term, 1956

No. 256

THE HENRY HANGER AND DISPLAY FIXTURE CORPORATION OF AMERICA, and THE HENRY HANGER AND DISPLAY FIXTURE CORPORATION OF FLORIDA,

Petitioners

—v.—

SEL-O-RAK CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes and Rules Involved	3
Questions Presented	2
Statement of the Case	4
Reasons for Granting the Writ	10
I. The Court of Appeals for the Fifth Circuit has rendered a decision herein in conflict with applicable decisions of this Court and with decisions of other courts of appeals on the same matter	10
II. The Court of Appeals for the Fifth Circuit has rendered a decision herein on important questions of federal law which may not have been but should be settled by this Court	25
Conclusion	26
Appendix	1A

Authorities Cited

Cases

Applied Arts Corporation v. Grand Rapids Metalcraft Corporation, 67 F. 2d 428	11
B. F. Sturtevant Co. v. Massachusetts Hair & Felt Co., 122 F. 2d 900, reh. den. 124 F. 2d 95, cert. den. 315 U. S. 823	15

PAGE

Battery Patents Corp. v. Chicago Cycle Supply Co., 111 F. 2d 861 20
Battery Patents Corp. v. Coe, 93 F. 2d 220 19
Boyce v. Chemical Plastics, 175 F. 2d 839, cert. den. 338 U. S. 828 15

Callison v. Dean, 70 F. 2d 55 24
Chas. D. Briddell, Inc. v. Alglobe Trading Corp., 194 F. 2d 416 25
Circle S Products Company v. Powell Products, Inc., 174 F. 2d 562 11
Connecticut Paper Products v. New York Paper Co., 127 F. 2d 423 11
Connolly v. Gishwiller, 162 F. 2d 428, cert. den. 332 U. S. 825 15
Crimmins v. Woodson, 177 F. 2d 788 15
Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84 18

Eaton v. Lewis, 115 F. 635, aff'd 127 F. 1018, cert. den. 194 U. S. 636 12

Forestek Plating & Mfg. Co. v. Knapp-Monarch Co., 106 F. 2d 554 ..... 10, 13

Gorham Company v. White, 81 U. S. 511 10
Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U. S. 605 15
Great Atlantic & Pacific Tea Company v. Supermarket Equipment Corp., et al., 340 U. S. 147 18

Hopkins v. Waco Products, Inc., 205 F. 2d 221..10, 11, 14, 22
Hueter v. Compco Corporation, 179 F. 2d 416 11

Jacob Elishewitz & Sons, Inc. v. Bronston Brothers & Co., Inc., 40 F. 2d 434 14

Kellogg Switchboard & Supply Co. v. Michigan Bell Tel. Co., 99 F. 2d 203, cert. den. 308 U. S. 582 24

PAGE

King Ventilating Co. v. St. James Ventilating Co., et al., 26 F. 2d 357 21
Knickerbocker Plastic Co. v. Allied Molding Corporation, 184 F. 2d 652 13
Koch Mfg. Co. v. Blue Star Auto Stores, 103 F. 2d 598 11
Kochring, Application of, 37 F. 2d 421 11

Lincoln Engineering Co. of Illinois v. Stewart-Warner Corp., 303 U. S. 545 18

New York Belting Co. v. New Jersey Rubber Co., 137 U. S. 445 14
North British Rubber Co. v. Racine Rubber Tire Co., 271 F. 936 11

O'Reilly v. Morse, 15 How. 62 13

Sandy MacGregor Co. v. Vaco Grip Co., 2 F. 2d 655 24
Seymour v. Ford Motor Co., 44 F. 2d 306 24
Smith v. Whitman Saddle Company, 148 U. S. 674 ..... 10, 17, 19
St. Germain v. Brunswick, 135 U. S. 227 11

Toledo Pressed Steel Co. v. Standard Parts, Inc., 307 U. S. 350 18
Tourneau v. Tishman & Lipp, 119 F. Supp. 593, aff'd 211 F. 2d 240 13

Wagner Typewriter Co. v. F. S. Webster Co., 144 F. 405 12
Waldron Products v. Indiana Limestone Co., 216 F. 2d 70 15
Weston E. M. Co. v. Odell, 18 F. 321 17
Williams Calk Co. v. Kemmerer, et al., 145 F. 928.. 12
Williams Calk Co. v. Neverslip Mfg. Co., 136 F. 210 12

Statutes

PAGE

Act of July 19, 1952, c. 950, §1, 66 Stat. 797, 35 U. S. C. A. §101 3

Act of July 19, 1952, c. 950, §1, 66 Stat. 798, 35 U. S. C. A. §103 3

Act of July 19, 1952, c. 950, §1, 66 Stat. 805, 35 U. S. C. A. §171 3

28 U. S. C. A. §1294 9

28 U. S. C. A. §1254(1) 2

28 U. S. C. A. §1338 9

35 U. S. C. A. §101 11

35 U. S. C. A. §102 11

35 U. S. C. A. §103 ..... 11, 17

35 U. S. C. A. §171 11

35 U. S. C. A. §171, Art. I, §8, cl. 8 ..... 10, 17

Rule

Federal Rules of Civil Procedure, Rule 52(a) ... 2, 4, 14, 15

Text

Campbell, Application of, 104 F. 2d 394 10

Stevens, Application of, 173 F. 2d 1015 11

Walker on Patents (Deller's ed. 1955 cum. supp.), pp. 176-189 25

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—v.—

SEL-O-RAK CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, defendants-appellees below, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 18, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported in 232 F. 2d 176.

The Special Master who heard the cause in the first instance issued an opinion which is set forth in the tran-

script of the record (R. 41-59), and is reprinted at pages 1A-18A *infra* of the Appendix. The District Court confirmed the Special Master, without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1).

QUESTIONS PRESENTED

1. Does respondent's combination design patent for a pants rack possess the novelty and invention necessary for validity where the design consists of components which are each old and the combination, if different or novel, is so only in its application to a pants rack?

2. Can novelty and invention for a pants rack design patent be established primarily by reference to the fact that the infringer has infringed and advertised the merits of the rack?

3. Is a pants rack design patent valid if its form is determined primarily by the function of the rack?

4. Is a pants rack design patent valid if the design is obscured by the pants which occupy the rack when in normal use?

5. Where the Court of Appeals herein made no finding that the findings at *nisi prius* were clearly erroneous, was reversal by the appellate court authorized pursuant to Rule 52 (a), F. R. Civ. Pro.?

STATUTES AND RULES INVOLVED

1. Act of July 19, 1952, c. 950, §1, 66 Stat. 797, 35 U. S. C. A. §101:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

2. Act of July 19, 1952, c. 950, §1, 66 Stat. 798, 35 U. S. C. A. §103:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

3. Act of July 19, 1952, c. 950, §1, 66 Stat. 805, 35 U. S. C. A. §171:

> "Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.
>
> The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided."

4. Rule 52 (a), Federal Rules of Civil Procedure, following 28 U. S. C. A.:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

STATEMENT OF THE CASE

Briefly stated, in its present posture the present cause is one for infringement by petitioners of respondent's pants rack design patent bearing registration D168143 and filed with the United States Patent Office on July 23, 1952 and granted on November 11, 1952. The subject of the patent is depicted at R. 22-24 and at ~~page 19A, *infra*, of the Appendix to this petition~~ 232 F 2d 181. The design has been ver-

bally described by the Court of Appeals for the Fifth Circuit as follows:

> "It consists of two drums of wood, one superimposed on the other in such way that the upper drum revolves; attached to the upper drum are trouser hangers which remain rigid and extended for the display of merchandise; attached to the lower drum or cylinder of smaller diameter than the upper, in proper proportion to the size of the entire article, are three vertical fins which, in the shape of a boomerang with convex side out, extend below the lower drum and form legs in the nature of a tripod to hold the rack" (232 F. 2d at p. 177).

For almost twenty years prior to the issuance of the aforesaid design patent, petitioners made and sold a pants rack which is also depicted in the Appendix hereto at page 21A, infra. As verbally described by the Court of Appeals, the rack manufactured and sold by the petitioners consisted of "a single very large drum * * * [which] has rigid extended trouser hangers * * * separated into four parts by vertical fin walls extending to the base of the hanger. The base itself is a flat circular piece of wood resting flat on the floor (232 F. 2d at p. 177).

The litigation here was instanced by the alleged appropriation by petitioners of the pants rack design patented by respondent.

The action was initiated by the Sel-O-Rak Corporation, a Florida corporation, to whom the design patent had been assigned, against the Henry Hanger & Display Fixture Corporation of America, a New York corporation, and the Henry Hanger & Display Fixture Corporation of

Florida, a Florida corporation. The relief asked for in the complaint, which alleged patent infringement and unfair competition, was a preliminary and permanent injunction enjoining the defendants from making or selling the patent; for an accounting of profits, for damages and costs; for a deliverance of all of the patented articles on hand by the defendants to the plaintiff; for triple damages, because the wilfull and deliberate infringement, and for attorneys' fees (R. 16-21).

The defendants answered the complaint interposing, in effect, a general denial and pleading that the design patent was invalid because of prior art, because of prior usage, and because the patent did not have inventive qualities (R. 28-31).

After the service of process, the Florida defendant-corporation interposed an answer and the New York defendant-corporation interposed a special notice of appearance contending there was no jurisdiction over it in Florida. Judge Holland of the United States District Court for the Southern District of Florida heard the motion of the latter defendant, to quash for lack of jurisdiction, and denied it (R. 35). No appeal was taken from this decision.

At the same time the jurisdictional application was made, the plaintiff moved for a temporary injunction (R. 32-34). This application was likewise denied, the District Court finding that the evidence did not show any present imminent danger of infringement, that the defendants were financially able to respond to any money damages should there be such, and that there was nothing to show

irreparable damage to the plaintiff or immediate probability thereof (R. 35-36). No appeals were taken by either side from this decision.

The cause was then referred by the District Court with consent of the parties to Edward E. Fleming, Esq., as a Special Master to hear and determine (R. 40).

The trial before the Master was devoted principally to the issues of the novelty and invention of the patent (R. 59-508). Infringement was not seriously controverted, the issue being whether defendants were right in their view that they were entitled to appropriate the design because of its invalidity as a patent.

At the conclusion of the trial the Master said in his opinion:

> "In connection with the above and foregoing, the Special Master wishes to point out that defendants' Exhibits A, B, C, D, E, F, G, I, J, K, L, M, N and O show what is alleged by the defendants to be prior art in connection with garment racks, tie racks, belt racks and pants racks. Attention is specifically directed to defendants' Exhibits C, D, E, F and G, because these exhibits show photographs of pants racks that were in use and manufactured by the defendants many years prior to the issuance of plaintiff's patent. They are similar in design and general idea to that of the plaintiff's design with the exception that these racks do not rest upon tripod legs.
>
> Tripod legs in furniture and fixtures is an old design and is frequently known in certain traditional furniture as 'Duncan Phyfe'" (App., p. 9A, *infra*).

"It is my opinion and I so find that there are certain basic similarities between plaintiff's patent and defendants' products shown by defendants' Exhibits C, D, E, F and G" (App., p. 10A, *infra*).

"There are no essential differences between plaintiff's patent and the other hangers shown by defendants' Exhibit 'A', with the exception of the skirt hanger shown therein, and defendants' Exhibits N and O, the latter two being rectangular constructed pants hangers. There is a skirt rack resting on tripod legs or base somewhat differently constructed and manufactured by the defendants, as shown by defendants' Exhibit M" (App., p. 11A, *infra*).

" . . . there is no essentially new idea or principle involved in plaintiff's patent, from existing prior art other than the fact that it was constructed to rest or be based upon tripod legs; tripod legs in furniture and fixtures is an old element, not with respect to pants hangers but with respect to furniture, fixtures, tables, couches and the like, which goes back over a period of many years.

It is my further opinion and I so find that every element used by the plaintiff in its pants rack is old in the art but that these old elements had not been combined in exactly the same manner as they were combined in plaintiff's patent" (App., p. 11A, *infra*).

". . . I do not believe that sufficient ingenuity or inventiveness has been shown in plaintiff's patent from that of prior art" (App., p. 12A, *infra*).

"While I would like to make a finding to the contrary on account of the general equities in this case, I find that the defendants have not been guilty of unfair competition as a matter of law and as a matter of law only" (App., pp. 16A-17A, *infra*).

Upon the basis of the foregoing, the Master concluded that the patent was invalid and that there had been no unfair competition, and he accordingly recommended dismissal of the complaint (App., p. 17A, *infra*).

Respondents duly filed objections to the aforesaid report (R. 512-519), but the United States District Court for the Southern District of Florida, Miami Division, whose jurisdiction was based upon 28 U. S. C. A. §1338, affirmed (except as to assessment of costs) without opinion (R. 520-521). Judgment thereon was entered (R. 521-522), and appeal to the Court of Appeals for the Fifth Circuit followed (R. 523).

The jurisdiction of the Court of Appeals was founded on 28 U. S. C. A. §1294.

The Court of Appeals unanimously reversed the Master and the District Court on the grounds that the patent was valid and infringed (232 F. 2d 180). No reference was made by the appellate court as to the claim of unfair competition, and we assume that phase of the case is no longer involved herein.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals for the Fifth Circuit has rendered a decision herein in conflict with applicable decisions of this Court and with decisions of other courts of appeals on the same matter.

The first consideration here is that the patent in issue is a design patent.

That the design is for a pants rack is inconsequential to the validity of the patent. For design patents are "plainly intended to give encouragement to the decorative arts." *Gorham Company* v. *White*, 81 U. S. 511, 524. It is the invention of a "new, original and ornamental design" which the Constitution and the Congress protect by a design patent. Art. I, §8, cl. 8; 35 U. S. C. A. §171. The particular application of the design, no matter how unique or attractive or creative, is not patentable if the design is old or uninspired. *Hopkins* v. *Waco Products, Inc.*, 205 F. 2d 221 (C. A. 7); *Forestek Plating & Mfg. Co.* v. *Knapp-Monarch Co.*, 106 F. 2d 554 (C. A. 6); *Application of Campbell*, 104 F. 2d 394 (C. C. P. A.). As this Court said and held in *Smith* v. *Whitman Saddle Company*, 148 U. S. 674, 679:

> "'. . . adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention' . . . a person cannot be permitted to select an existing form and simply put it to a new use * * *"

So integrally and exclusively related is a design patent to the design rather than to the particular application of the design, that not only is the design's utility irrelevant [*Koch Mfg. Co.* v. *Blue Star Auto Stores*, 103 F. 2d 598 (C. A. 7)], but to the extent that the design is dictated by its particular function, the patent is invalid [*Hopkins* v. *Waco Products, Inc., supra; Hueter* v. *Compco Corporation*, 179 F. 2d 416 (C. A. 7); *Circle S Products Company* v. *Powell Products, Inc.*, 174 F. 2d 562 (C. A. 7); *Connecticut Paper Products* v. *New York Paper Co.*, 127 F. 2d 423 (C. A. 4); *Applied Arts Corporation* v. *Grand Rapids Metalcraft Corporation*, 67 F. 2d 428 (C. A. 6)].

Accordingly, on the issue whether respondent's design possesses the novelty and invention essential for patentability (35 U. S. C. A. §§101, 102, 103, 171), inquiry must be confined to the quality of the design and without regard for its particular utilization as a pants rack. Such confinement of inquiry is especially required here where the rack has not been patented except as a design since any functional patent would plainly be unavailable (*St. Germain* v. *Brunswick*, 135 U. S. 227). Indeed, if the patent's function as a pants rack were here to be taken into account, the patent would necessarily fail since when the rack is packed with pants it is virtually entirely obscured (see Plaintiff's Ex. 5, 15 at App., pp. 18A-20A, *infra*); when in use, the respondent's pants tree cannot be seen for the pants; a design of an article of manufacture which is unseen when in normal use is not entitled to a design patent [*Application of Stevens*, 173 F. 2d 1015 (C. C. P. A.); *Application of Kochring*, 37 F. 2d 421 (C. C. P. A.); *North British Rubber Co.* v. *Racine Rubber Tire Co.*, 271 F. 936

(C. A. 2); *Williams Calk Co.* v. *Kemmerer, et al.*, 145 F. 928 (C. A. 3); *Wagner Typewriter Co.* v. *F. S. Webster Co.*, 144 F. 405; *Williams Calk Co.* v. *Neverslip Mfg. Co.*, 136 F. 210 (C. C. M. D. Pa.); *Eaton* v. *Lewis*, 115 F. 635 (C. C. S. D. N. Y.), *aff'd* 127 F. 1018 (C. A. 2), *cert. den.* 194 U. S. 636]. We therefore proceed to the inquiry whether the respondent's design, viewed exclusively in terms of its aesthetic qualities, is novel or inventive as those terms have been authoritatively defined.

A.

It is undisputed, on the issue of novelty, that the components of the design were, at least severally, old. Viewing the respondent's design from top to bottom (see ~~App., p. 19A, *infra*~~), the disk, the upper cylinder, the hangers, the lower disk, and the tripod base were each known and even ancient forms. The Special Master so found (App., p. 11A, *infra*), the District Court Judge affirmed this finding (R. 520-1), and the Court of Appeals acknowledged "* * * the fact that the separate elements of a drum of different proportions, of a tripod of unspecified proportions or period, and of a cylindrical support for the upper drum were not new" (232 F. 2d at p. 179). The original patentee himself attested to the lack of novelty of each component of his design except for the tripod base (R. 177-8), and as to the latter the respondent's expert witness testified it was "an Egyptian invention" (R. 218). For almost twenty years preceding respondent's design, petitioners designed and distributed widely a pants rack such as respondent's, differing only in three particulars: re-

spondent's rack rests on a tripod, not flat on the floor; the diameter of the drum of respondent's rack is smaller; and respondent's rack has no dividing partitions (see App., p. 10A, *infra*). In addition, respondent's rack can be rotated and petitioners' was stationary, but concededly this feature is not within the patent claim and is not to be considered on the issue of validity (App., p. 14A, *infra*). The court below, however, at variance with the Master and the District Court, concluded that the old elements of respondent's design were, in combination, new. This conclusion of the Fifth Circuit, we believe to be predicated upon the finding by the Court of Appeals that respondent's pants rack is of novel design as a rack, not that the design is novel; the Court of Appeals for the Fifth Circuit has, therefore, in conflict with the applicable decisions of this Court and those of the other Circuits here sustained a design patent as to novelty for reasons based upon the novelty of application not design.

A design, particularly that comprised of a combination of known designs, is novel if it creates a "new impression on the eye" (*Forestek Plating & Mfg. Co.* v. *Knapp-Monarch Co.*, *supra*, at p. 559). It is not enough if the combination of old patterns results in an "unstartling regrouping" [*Knickerbocker Plastic Co.* v. *Allied Molding Corporation*, 184 F. 2d 652, 654 (C. A. 2); *Tourneau* v. *Tishman & Lipp*, 119 F. Supp. 593 (S. D. N. Y.), *aff'd* 211 F 2d 240 (C. A. 2)]. Novelty of design means that the design was unknown to anyone before, and mere novelty of form is insufficient. *O'Reilly* v. *Morse*, 15 How. 62.

As against the foregoing applicable standards of novelty, it must be recalled that the respondent's design differs from that used by the petitioners for many years prior to the patent, primarily, if not entirely, because the respondent's rack is based upon a tripod leg while the petitioners' racks were placed flat to the floor. As a matter of law, however, the respondent's tripod base cannot sustain the alleged novelty of the design patent. For since the respondent's rack contained the unpatented and the unpatentable feature of the capacity to rotate while the petitioners' rack was stationary, the different base employed by the respondent was necessitated by the functional aspects of respondent's rack. It would therefore appear that the base utilized by the respondent has its origin in function rather than in design and therefore fails to provide the foundation of novelty required for a patentable design. *Hopkins* v. *Waco Products, Inc., supra.*

Even if the allegedly new features of the respondent's design be appraised independently of the functions they performed, the finding of novelty by the Court of Appeals is in conflict with the governing authorities. Novelty of design is a question of fact. *New York Belting Co.* v. *New Jersey Rubber Co.*, 137 U. S. 445; *Jacob Elishewitz & Sons, Inc.* v. *Bronston Brothers & Co., Inc.*, 40 F. 2d 434 (C. A. 2). Rule 52(a) of the Federal Rules of Civil Procedure, following 28 U. S. C., provides:

> "In all actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous. . . . The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

In accordance with Rule 52(a) it has uniformly been held that any finding of a Special Master confirmed by the District Court is binding upon the Court of Appeals unless such finding is clearly erroneous. *Waldron Products Co.* v. *Indiana Limestone Co.*, 216 F. 2d 70 (C. A. 7); *Crimmins* v. *Woodson*, 177 F. 2d 788 (C. A. 4); *Boyce* v. *Chemical Plastics*, 175 F. 2d 839 (C. A. 8), *cert. den.* 338 U. S. 828; *Connolly* v. *Gishwiller*, 162 F. 2d 428 (C. A. 7), *cert. den.* 332 U. S. 825. And this application of Rule 52(a) extends as well to findings of a master, confirmed by a District Court, on issues of patentability and infringement. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605; *B. F. Sturtevant Co.* v. *Massachusetts Hair & Felt Co.*, 122 F. 2d 900 (C. A. 1), *reh. den.* 124 F. 2d 95, *cert. den.* 315 U. S. 823.

The Master here concluded:

> "It is my opinion and I so find that there is no essentially new idea or principle involved in plaintiff's patent, from existing prior art other than the fact that it was constructed to rest or be based upon tripod legs; tripod legs in furniture and fixtures is an old element, not with respect to pants hangers but with respect to furniture, fixtures, tables, couches and the like, which goes back over a period of many years.
>
> It is my further opinion and I so find that every element used by the plaintiff in its pants rack is old in the art but that these old elements had not been combined in exactly the same manner as they were combined in plaintiff's patent.
>
> I do not believe, and I so find, that there was sufficient inventiveness in the creation and construction of plaintiff's patented article as distin-

guished from prior art. In connection with the use of pants hangers, the discs are old, the hangers themselves are old, the drum or center cylindrical construction is old and the tripod legs are old. It is true that they have never been combined before in substantially the same manner as plaintiff's patented pants rack.

* * * * *

Frankly, I do not believe that sufficient ingenuity or inventiveness has been shown in plaintiff's patent from that of prior art'' (App., pp. 11a-12a, *infra*).

The Court of Appeals for the Fifth Circuit did not discuss or refute in any particular the factual bases stated by the Special Master for his finding that neither the tripod used by the respondent nor the tripod in conjunction with the other elements of the respondent's design amounted to novelty. Nor did the Circuit Court expressly state or conclude that the finding of the Special Master, as affirmed by the District Court, was ''clearly erroneous.'' Instead, the Circuit Court discussed the alleged novelty of the use of a tripod for a pants rack and otherwise appeared to be persuaded on the issue of novelty by the newness of the respondent's design as a pants rack. Thus, the Court of Appeals stated that novelty of design ''was conceded by the appellees [petitioners] in their advertising, in which they called it 'amazing new space saver', 'revolutionary in concept' '' (232 F. 2d at p. 179). Since the advertising thus heavily relied upon was intended to extol, in the extravagant language often found in advertising, the unique features of respondent's racks *qua* racks, not designs, it is clear that the court below fell into the error of evaluating the novelty of the pants rack de-

signed by respondents rather than the novelty of the design itself. This error brings the decision of the court below into direct and substantial conflict with the decisions of this Court and of other Circuit Courts as such decisions have hereinbefore been set out.

B.

Assuming that the design here under review possessed the quality of novelty, the issue still remains whether the patent also attains the level of inventiveness necessary for validity.

The Patent Act provides, at 35 U. S. C. A. §171, that a design patent is governed by the other sections of the Act relating to patents or inventions. (See also *Smith* v. *Whitman Saddle Co., supra*, at 679.) There is therefore applicable to design patents the following language of 35 U. S. C. A. §103:

> "A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

While on circuit, Mr. Justice Blodgett, in *Weston E. M. Co.* v. *Odell*, 18 F. 321, 322 (N. D. Ill), defined the standard of invention in design patents:

> "It is now tolerably well settled that design patents stand on as high a plain as utility patents, and

> require as high a degree of exercise of the inventive or originative faculty." [See also *Battery Patents Corp.* v. *Coe*, 93 F. 2d 220 (App. D. C.); *Neufeld-Furst & Co. Inc.* v. *Jay-Day Frocks Inc.*, 112 F. 2d 715 (C. A. 2); *S. Dresner & Son, Inc.* v. *Doppelt*, 120 F. 2d 50 (C. A. 7).]

Where, as here, the presence of invention has to be determined in an instance of the combination of old and well-known components, the governing standard is, accordingly, that to be found in *Great Atlantic & Pacific Tea Company* v. *Supermarket Equipment Corp., et al.*, 340 U. S. 147. In that case this Court confirmed that a combination of old parts which is a mere aggregation producing no new or different function by the components does not constitute patentable invention. See also *Lincoln Engineering Co. of Illinois* v. *Stewart-Warner Corp.*, 303 U. S. 545; *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.*, 307 U. S. 350; *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84. Mr. Justice JACKSON then proceeded to elaborate the rule as follows:

> "The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. Elements may, of course, especially in chemistry or electronics, take on some new quality or function from being brought into concert, but this is not a usual result of uniting elements old in mechanics. This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned, and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test.

> Neither court below has made any finding that old elements which made up this device perform any additional or different function in the combination than they perform out of it. . . . Two and two have been added together, and still they make only four.
>
> Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly" (340 U. S. 152-153).

The rule of the *A & P* case concerning the measure of inventiveness required of a combination patent is essentially the same test which has been applied to design patents composed of a combination of old designs. In *Smith* v. *Whitman Saddle Co.*, *supra*, at 679, this Court declared that the level of invention required in the case of a combination design patent is "something akin to genius". The Court of Appeals for the District of Columbia in *Battery Patents Corp.* v. *Coe*, *supra*, after reviewing the authorities dealing with combination design patents, required "inventive genius" (p. 220) as a condition for sustaining such a patent. While the Court of

Appeals for the Seventh Circuit in *Battery Patents Corp.* v. *Chicago Cycle Supply Co.*, 111 F. 2d 861 (C. A. 7), said that designs consisting of combinations must consist "of creative artistry" (p. 863) to meet the tests of patentability.

As against these standards it is difficult to appreciate how there can be any serious argument to the effect that the superimposition of a drum-like object upon a Duncan Phyfe tripod involves inventive genius. Given the necessities of a circular drum-like object from which to suspend slacks and a base which would support and lift that drum from the floor so that it could revolve freely, the design of the respondent would seem to be dictated by the obvious rather than inspired by artistic creativity. Innumerable pieces of furniture, coffee tables, conversation pieces, and bric-a-brac, as the Special Master found (App., p. 11A, *infra*), incorporate the basic characteristics of the respondent's design: a circular drum-like object based upon a Duncan Phyfe set of legs. However clever or even resourceful it may have been for the respondent to adapt an ancient silhouette to a novel purpose, the respondent still has done no more than to combine two forms (a drum on top of a tripod base) which have been combined endlessly before and which in combination produce nothing other than a mere aggregate of the components. The base still remains a base, the drum still remains a drum, and together they remain, as always, a drum superimposed on a base.

While the validity of each patent must depend upon its individual facts, at least two prior determinations by Courts of Appeal strongly suggest a conflict of approaches

between the Fifth Circuit and the Seventh and Eighth Circuits.

In *King Ventilating Co.* v. *St. James Ventilating Co., et al.*, 26 F. 2d 357 (C. A. 8), the issue was the validity of a design patent for a ventilator. It was claimed that the unique feature of the design was that the ventilator contained a base which was flared in accordance with the pitch of the roof. The Eighth Circuit affirmed the finding of the District Court that no patentable invention was involved, stating as follows:

> "The exercise of the inventive faculty is just as essential to the validity of a design patent as it is to that for any kind of mechanical device. Star Bucket Pump Co. v. Butler Mfg. Co. (D. C.), 198 F. 857; Smith v. Whitman Saddle Co., 148 U. S. 674, 13 S. Ct. 768, 37 L. Ed. 606; Knapp v. Will & Baumer (C. C. A.), 273 F. 380; Whiting Mfg. Co. v. Alvin Silver Co. (C. C. A.), 283 F. 75; Imperial Glass Co. v. Heisey & Co. (C. C. A.), 294 F. 267. In Strause Gas Iron Co. v. William M. Crane Co. (C. C. A. 2), 235 F. 126, the rule is thus stated: 'The test for invention is to be considered the same for designs as for mechanical patents.' Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand.
>
> The great similarity between appellant's patented design and the structures of the prior art is strikingly apparent. In its opinion the trial court said: 'I do not believe it can be said in this case that the application of the old flared base to the old top or super-structure rises to the point of anything more than the ordinary routine skill of a competent architect.' With this statement, we agree. The change in

> form of the base involved no more than mechanical skill, as distinguished from patentable invention" (26 F. 2d, at 359).

In *Hopkins* v. *Waco Products, Inc.*, *supra*, the design patent in issue was a tubular luggage rack with allegedly "gracefully curved" tubular legs. The Seventh Circuit there affirmed the District Court finding of an absence of patentable invention, stating:

> "An earlier luggage rack manufactured by Waco was similar to the design of the rack in suit except that it had no wall protector bar or guard. This addition to the old type of rack was largely functional, and it was primarily on that functional basis that Hopkins promoted its sale. True the bar was gracefully curved, but this shape also rested on practical considerations, because it was established that the steel tubing used could not be sharply bent without endangering its structural strength.
>
> • • • • •
>
> The district court found that the dominant feature of Hopkins' baggage rack was its design to prevent damage to hotel rooms, stating, 'Thus, the "wall-guard" was designed to prevent luggage from damaging walls, and the curved tips of the legs were designed to prevent damage to floor coverings.' [107 F. Supp. 887.] We cannot say that this finding is clearly erroneous" (205 F. 2d, at 224).

As previously indicated, the Special Master herein and the District Court concluded that the respondent did not display any patentable inventive faculty in the combination of the known components designed by respondent. The Court of Appeals, again without characterizing the

carefully considered conclusion of the Special Master or of the District Court as "clearly erroneous", determined that invention here was demonstrated by the fact that petitioners allegedly appropriated respondent's design and advertised it as "revolutionary in concept". No other proof of record is cited or relied upon by the Circuit Court for its determination that invention was present in the respondent's design.

The reference in petitioners' advertising that the rack was "revolutionary in concept" plainly had no reference to the design features of the respondent's rack. An examination of Plaintiff's Exhibits 5 and 15 containing the petitioners' advertising (App., pp. 19A-21A, *infra*), makes it clear that the principal "revolutionary" feature being puffed by petitioners was the capacity of the rack to revolve. The most prominent pictures of the racks in that advertising display the racks fully loaded with pants so that the design of the rack is undiscernible. It was accordingly gross error to rely upon the petitioners' advertising as proof of invention by respondents.

And it was, of course, equally gross error to transmute infringement of the patent by appropriation into an estoppel to assert the invalidity of the patent. If every act of infringement by appropriation disqualifies the infringer from challenging the inventiveness displayed by the patentee, few, if any, patents would ever be adjudicated as invalid for lack of invention. Every one of the multitudinous cases striking down a patent for the absence of invention, where the infringing party urged the lack of invention as a defense, is authority in conflict with the ruling of the Court of Appeals for the Fifth Circuit herein.

Thus it has been squarely held that infringement constitutes no estoppel to assert absence of invention. *Sandy MacGregor Co.* v. *Vaco Grip Co.*, 2 F. 2d 655 (C. A. 6); *Seymour* v. *Ford Motor Co.*, 44 F. 2d 306 (C. A. 6); *Callison* v. *Dean*, 70 F. 2d 55 (C. A. 10). As the Court of Appeals for the Sixth Circuit declared in *Kellogg Switchboard & Supply Co.* v. *Michigan Bell Tel. Co.*, 99 F. 2d 203, 205 (C. A. 6), *cert. den.* 308 U. S. 582:

> " . . . the law is clearly settled that however inconsistent an early attempt to secure a patent may be with a later challenge to its validity for want of invention, such inconsistency affords no basis for an estoppel, nor does it preclude the court from relieving the alleged infringer from the asserted monopoly, Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U. S. 464, 55 S. Ct. 449, 79 L. Ed. 997; Haughey v. Lee, 151 U. S. 282, 285, 14 S. Ct. 331, 38 L. Ed. 162, and this court has likewise so decided. McCloskey v. Toledo Pressed Steel Co., 6 Cir., 30 F. 2d 12. The public is always a third party to an infringement suit, and its rights may not be waived by the conduct of alleged infringers, however repugnant to their later contentions."

On the issue of invention, as on that of novelty, the Court below reversed rulings at *nisi prius* which were avowedly mandated by the prior decisions of this Court and of the other Circuits (R. 54-57); in the circumstances, certiorari is warranted because of the variance between those prior decisions and the decision of the Fifth Circuit herein.

II.

The Court of Appeals for the Fifth Circuit has rendered a decision herein on important questions of federal law which may not have been but should be settled by this Court.

For the reasons hereinbefore set forth, we believe that the ruling below is in conflict with applicable decisions of this Court and the decisions of other Circuits. In the event that this Court should be of the view that the matters discussed as to the issues of novelty and invention have not been dispositively and conclusively settled by this Court and by other Circuits in a manner directly at variance with the decision below, then, at the least, it is urged by petitioners that the nature and significance of the questions herein raised justify the granting of the writ for the purpose of final determination of those issues by this Court.

Design patents have come to be of increasing frequency and importance. At least one Circuit has commented on the unique difficulties encountered in obtaining such a patent. *Chas. D. Briddell, Inc.* v. *Alglobe Trading Corp.*, 194 F. 2d 416 (C. A. 2). It would, moreover, appear that in only relatively few instances has this Court written at any considerable length on the problems created by design patents and the last of such opinions is more than fifty years old. See cases collected at Walker on Patents (Deller's ed. 1955 cum. supp.), pp. 176-189. The law pertaining to invention and discovery patents has been in a continuous state of evolution and development reflecting

changing economic circumstances and attitudes; it may be timely for the law of design patents to be authoritatively reviewed by this Court in order that that body of law may likewise be adapted to modern circumstances. If so, we submit that the instant case is an appropriate case for such review, since it raises precisely those issues of novelty and invention which lie at the heart of any system of patents.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

MILTON M. MOKOTOFF
Attorney for Petitioners

On the brief:
MILTON M. MOKOTOFF
MURRAY A. GORDON

APPENDIX

Findings and Report of Special Master

(Title Omitted)

The original complaint for infringement of a patent and for unfair competition was filed in this Court on March 4, 1953. Thereafter, an amendment to the complaint was filed on March 11, 1953, together with a motion of plaintiff for leave to take deposition, which motion was denied. Thereafter, an amended complaint was filed on March 25, 1953, which alleged, among other things that the plaintiff was a Florida corporation and that the defendants, The Henry Hanger & Display Fixture Corporation of America, was a New York corporation, and that The Henry Hanger and Display Fixture Corporation of Florida, was a Florida corporation, and that they had interlocking officers, directors and incorporators.

It was further alleged that the jurisdiction of the Court was based upon the Patent Laws, and that Sel-O-Rak Corporation was the owner of U. S. Letters Patent No. D-168,143, granted to Maurice Cohen on November 11, 1952, which was assigned to the plaintiff and a copy of the assignment was attached to the complaint along with a copy of the Letters Patent.

The amended complaint further alleged that the defendants purchased from the Sel-O-Rak Corporation one or more of its garment display racks, which the plaintiff manufactured under the patent and that the defendants wilfully and deliberately copied and pirated plaintiff's

patent design and wilfully and deliberately sold said copies and infringed plaintiff's letters patent and threaten to continue to do so. A photographic reproduction of defendants' literature showing defendants' copied design in a trade journal known as "Men's Wear" was attached to the amended complaint.

The amended bill further alleged that the defendants had unfairly competed with the plaintiff by wilfully copying and pirating plaintiff's design, holding out that the garment display rack manufactured by the defendants was the original and first display rack of its kind on the market, representing to prospective customers of the plaintiff that plaintiff was copying the design of the defendants and that defendants had entered into national advertising in nationally distributed publications, exact photographic reproductions of plaintiff's design as their own design, capitalizing on the good will created by the plaintiff's rack in the trade and producing confusion and deception in the trade, leading others to believe that the defendants' copied design was the same article advertised, manufactured and sold by the plaintiff.

The amended complaint further alleged that notice had been given to defendants of its patent rights and that the patent, being No. D-168,143, had already been adjudicated and a decree favorable to the plaintiff had been granted in another case, being:

Maurice Cohen and Sel-O-Rak Corporation vs. Morris Cohen and Merle Cohen, dba Seaboard Equipment Co.—Civil Action #5759M—District Court for the Southern District of Florida—in a Consent Decree dated January 15, 1953.

The amended complaint further alleged that the defendants had derived unlawful gains and profits from their unfair competition and infringement of plaintiff's patent and had caused the plaintiff irreparable damage and injury as well as loss of profits.

The bill prayed for a preliminary and permanent injunction and an accounting for profits and that the defendants be required to deliver to plaintiff any and all finished garment racks in their possession.

The amended bill also prayed for the recovery of general and special damages for the alleged infringement and for the unfair competition, including the costs of the case and attorneys' fees.

It should be noted that this amended bill was filed after a motion and order granting leave to file an amended bill.

Various motions were filed to take the testimony of Henry Spitz, President of the two companies, Bernard Spitz, Vice-President of the two companies, and Herbert Spitz, brother of Bernard Spitz and salesman for both companies, and after some maneuvering by each side, the depositions of Henry Spitz, Bernard Spitz and Herbert Spitz were taken and admitted in evidence, subject to certain deletions, as plaintiff's Exhibits 12 and 16.

Affidavits of several people connected with the defendants appear in the file.

A special appearance was filed in behalf of The Henry Hanger and Display Fixture Corporation of America, and on April 15, 1953 an answer of the defendant, The Henry Hanger and Display Fixture Corporation of Florida was filed.

Appendix—Findings and Report of Special Master

The foregoing answer of The Henry Hanger and Display Fixture Corporation of Florida denied certain allegations of the amended bill and alleged that the letters patent issued to the plaintiff's predecessor were invalid because the design purported to be patented and all of its substantial parts were patented or described in printed publications prior to the alleged invention or discovery thereof by the patentee and alleged that the patentee of said Design Letters Patent was not the first original or sole discoverer of the material or substantial parts of the design patented and further alleged that the design covered by the patent did not constitute patentable subject matter and did not possess patentable novelty or invention within the meaning of the Patent Laws of the United States in view of the prior state of the art, and this answer prayed that the patent involved in the suit be declared invalid and not infringed by the defendant.

There were several motions, stipulations and orders entered in reference to the taking of the deposition.

Upon a motion of the New York corporation, the Court entered an order dated January 11, 1954 making certain findings of fact and conclusions of law, in which the application for a preliminary injunction was denied and the motion of the New York corporation was denied.

Finally, on February 26, 1954, the defendant, The Henry Hanger & Display Fixture Corporation of America, filed an answer which was, in effect, the same as the answer that had theretofore been filed by the Florida corporation.

Appendix—Findings and Report of Special Master

ORDER OF REFERENCE:

The cause was referred to the undersigned Special Master under date of March 24, 1954.

AS TO TESTIMONY:

Two days were devoted to the taking of testimony, on May 13 and May 14, 1954 before the Special Master in his offices at 714 Ingraham Building, Miami, Florida, as shown by a transcript of the proceedings filed herein and taken by Mr. Isidor Bakst, Court Reporter.

There were enumerable exhibits filed before the Special Master, which are contained in a brown envelope marked, "Exhibits in Sel-O-Rak Corp. vs. The Henry Hanger & Display Fixture Corp., et al.", being filed herein with the transcript of the testimony and these findings and recommendations.

Aside from the depositions, there were only four witnesses who testified before the Special Master, as shown by the index to the transcript of the testimony.

I find that there are three major questions presented in this case, namely:

1. Is the patent owned by the plaintiff corporation and originally issued to Maurice Cohen, a valid patent, notwithstanding its issuance by the Patent Office?

2. Has there been an infringement or pirating of such patent rights by the defendants or either one of them?

3. Have the defendants engaged in unfair competition as against the plaintiff?

If the above questions should be resolved in favor of the plaintiff and answered affirmatively, then and thereupon is involved the additional question of what damages should be assessed in favor of the plaintiff as against the defendants.

This has been a very difficult case for me to decide because, frankly, my sympathies are with the plaintiff. Plaintiff is a small corporation apparently solely engaged in the manufacture, production and distribution of the Sel-O-Rak Pants Rack. Defendants are both large corporations, the New York corporation having been engaged in business for a long period of time in the manufacture and distribution of display fixtures and furniture for men's apparel stores throughout the United States or the world.

The respective parties have filed voluminous briefs of between 150 to 200 pages, each side citing and relying upon very respectable legal authorities, including decisions of the Supreme Court of the United States and the decisions of many Federal Circuit Courts of Appeal in the United States.

I am making a finding on the second question before making a finding on the first question, realizing that the answer to the first question is determinative. In view of my findings and recommendations, an answer to the second question seems to be superfluous and unnecessary. However, I do find as follows:

A. The two pants racks, one manufactured by the plaintiff and covered by its patent, and the other one manufactured by the defendants or certainly the New York defendant, were offered in evidence and admitted in evi-

dence as plaintiff's Exhibit 4 and plaintiff's Exhibit 7. These original exhibits, I am advised, are not in possession of the Clerk of the Court because of the inconvenience involved in storing or keeping such exhibits but are in the possession of the plaintiff corporation, and will be produced to the Court at the time of the argument. The photograph or picture of these two exhibits is shown in defendants' Exhibit "P" which was admitted in evidence by the Special Master; the pants rack on the left having been manufactured and produced by the plaintiff and the pants rack shown on the right having been manufactured, produced and distributed by the defendants. I further find that the defendants have infringed upon and pirated the patent of the plaintiff, if such patent is valid as will hereinafter be covered, in the following manner:

The defendants purchased one or more of these pants racks from the plaintiff with the idea and purpose of acting as a distributing agent of the plaintiff in the sale and distribution of same throughout the United States and the world and shortly thereafter copied or imitated said pants rack as its own manufactured product and advertised in certain trade journals and magazines the identical pants rack. This is shown by plaintiff's Exhibits, 11, 13, 14 and 15, and the advertising material contained in such advertsements of the defendants was very similar to the advertisements of Sel-O-Rack Corporation of America, the plaintiff. See plaintiff's Exhibit 5.

Moreover, photographs of the pants rack of the plaintiff furnished by the plaintiff to the defendants were used by the defendants for advertising its copied and imitated pants rack.

I further find that there is no substantial difference between the pants rack of the plaintiff and the pants rack manufactured and distributed by the defendants and that to all practical purposes they are the same. There are two or three very minor differences in these pants racks, which defendants emphasized throughout the hearing before the Special Master, but these differences were minor and insubstantial.

Based upon the above, I, therefore, further find that the defendants have copied, imitated and infringed upon whatever rights plaintiff may have had.

I realize and so state, in view of the next finding, that the above findings are irrelevant and immaterial but they have been made because the Special Master realizes that he may be reversed upon the next finding.

B. Findings as to the First Question:

I further find that the plaintiff does not have a valid and enforceable patent and this finding is based upon the following matters and things, to-wit:

While the Patent Office issued to the plaintiff's predecessor, Maurice Cohen, a patent, the issuance by the Patent Office of such patent is only presumptively valid and the validity of such patent may be contested in the Courts and frequently over the years the Courts have invalidated patents, notwithstanding the issuance thereof by the Patent Office. However, the burden of showing the invalidity of such patent is upon the defendants in this case and the Special Master is of the opinion and so finds that the

defendants have met this burden and established the invalidity of such patent by what is called in the patent business, a "Prior Art".

In connection with the above and foregoing, the Special Master wishes to point out that defendants' Exhibits A, B, C, D, E, F, G, I, J, K, L, M, N and O show what is alleged by the defendants to be prior art in connection with garment racks, tie racks, belt racks and pants racks. Attention is specifically directed to defendants' Exhibits C, D, E, F and G, because these exhibits show photographs of pants racks that were in use and manufactured by the defendants many years prior to the issuance of plaintiff's patent. They are similar in design and general idea to that of the plaintiff's design with the exception that these racks do not rest upon tripod legs.

Tripod legs in furniture and fixtures is an old design and is frequently known in certain traditional furniture as "Duncan Phyfe".

As heretofore pointed out, defendants' Exhibit "P" is a photograph of plaintiff's pants rack on the left and defendants' pants rack on the right, and plaintiff's Exhibit 16 is a photograph of plaintiff's pants rack.

At the time of the hearing I very closely examined plaintiff's Exhibits 4 and 7, which are the actual pants racks manufactured by plaintiff and defendants. I do not have before me now these original exhibits of the actual pants racks because they are either in the Court or in the possession of the plaintiff. I have again examined and studied in some detail plaintiff's Exhibit 16, which is a photograph of plaintiff's pants rack. I have again viewed

and examined in detail defendants' Exhibit "P", which is a photograph of plaintiff's pants rack on the left and defendants' pants rack on the right. I have examined, viewed and studied defendants' Exhibits C, D, E, F and G. I have likewise examined and carefully studied the other photographs which claim prior art, such as defendants' Exhibits B, I, J and K.

It is my opinion and I so find that there are certain basic similarities between plaintiff's patent and defendants' products shown by defendants' Exhibits C, D, E, F and G.

Examination of plaintiff's Exhibit 16 and defendants' Exhibit "P" will show that the pants rack of the plaintiff consists of a top disc with arms or supporting hangers attached thereto and suspended therefrom upon which the pants for display purposes are hung or attached. These hangers or arms are based upon a second disc and in between the two discs is a cylindrical construction or drum which is built and based upon three, or tripod, legs. This is a movable fixture and what is known in the trade as an "island" fixture, which means it can be moved in and about the aisles or other places of a store.

Defendants' Exhibits D, E and F show a somewhat similar device or pants hanger with the following exception, namely, two dividers which separate the hangers into four separate areas or spaces. The disc is used a drum or cylindrical construction is used, and the same arms or hangers are used. The only thing that is not used is a tripod leg.

These hangers rest upon a stationary circular base. The

devices and hangers shown by defendants' Exhibits D, E, F and G and also defendants' Exhibit C, were manufactured by the defendants and distributed and sold and used many years before plaintiff's assignor, Maurice Cohen, obtained his patent.

There are no essential differences between plaintiff's patent and the other hangers shown by defendants' Exhibit "A", with the exception of the skirt hanger shown therein, and defendants' Exhibits N and O, the latter two being rectangular constructed pants hangers. There is a skirt rack resting on tripod legs or base somewhat differently constructed and manufactured by the defendants, as shown by defendants' Exhibit M.

It is my opinion and I so find that there is no essentially new idea or principle involved in plaintiff's patent, from existing prior art other than the fact that it was constructed to rest or be based upon tripod legs; tripod legs in furniture and fixtures is an old element, not with respect to pants hangers but with respect to furniture, fixtures, tables, couches and the like, which goes back over a period of many years.

It is my further opinion and I so find that every element used by the plaintiff in its pants rack is old in the art but that these old elements had not been combined in exactly the same manner as they were combined in plaintiff's patent.

I do not believe, and I so find, that there was sufficient inventiveness in the creation and construction of plaintiff's patented article as distinguished from prior art. In connection with the use of pants hangers, the discs are old,

the hangers themselves are old, the drum or center cylindrical construction is old and the tripod legs are old. It is true that they have never been combined before in substantially the same manner as plaintiff's patented pants rack.

There has been considerable argument in this case by both sides as to what the true test is to create a "design patent" that will be legally upheld. The defendants claim that the true test is that the new article must show something that is either "akin to genius" or "flash genius". Flash genius does not mean that it is to be conceived and developed in a flash but can be conceived and developed over a short or long period of time. The word "flash" is somewhat misleading, as I have found in an examination of the cases.

The plaintiff contends that the so-called theory of the law that the design patent must be an object produced by something that is akin to genius or flash genius is not applicable and is an outworn and outdated theory of the law.

The Special Master has no opinion as to whether the above theory is still applicable or has been outmoded and I do not feel that it is necessary to so decide in this case.

Frankly, I do not believe that sufficient ingenuity or inventiveness has been shown in plaintiff's patent from that of prior art.

The plaintiff contends, and with considerable persuasiveness that the pants hanger designed, produced and distributed by the plaintiff has met with considerable success in that some 1500 units have been sold and distri-

buted to the trade since about mid-June of 1952 when production apparently was begun by the plaintiff company or its predecessor. However, the Supreme Court of the United States, in the case of Great Atlantic & Pacific Tea Company vs. Supermarket Equipment Corporation, decided in 1950, 340 U. S. 147, 71 S. Ct. 127, held that commercial success with invention would not make patentability.

The plaintiff also claims, and with considerable persuasiveness, that the patent of the plaintiff should be upheld because the defendants imitated it, copied it, reproduced it, and put it on the market and advertised it as their own product and that, therefore, this recognition by the defendants of the usability or the novelty of the plaintiff's pants hanger should be decisive or at least important in the determination of this case. The Special Master is of the opinion that this is not sufficient, although I do not commend the defendants in copying and imitating plaintiff's patent and pirating it, and this would be conclusive, in my opinion, if plaintiff's patent should be legally enforced and validated by the Court.

The Special Master has read all of the briefs submitted by both sides and has read a number of cases cited by both sides. The Special Master has not actually read all of the cases cited by all of the parties but numerous of the cases have been actually examined and studied and, needless to say, this has required considerable time.

The Special Master is inclined to follow the following cases:

Great Atlantic & Pacific Tea Company v. Supermarket

Equipment Corp., decided by the Supreme Court of the United States in 1950, 340 U. S. 147,

Charles B. Smith et al., v. Whitman Saddle Company, 148 U. S. 674, decided in 1893 involving a design patent,

Cuno Engineering Corp. v. Automatic D. Corp., 314 U. S. 84,

Atlantic Works v. Edwin L. Brady, 107 U. S. 192,

Bailey v. Continental Gin Co., 77 F. (2d) 495, C. C. A. Fifth Circuit, also

Reed Roller Bit Co. v. Brewster Co. Inc., 65 F. (2d) 1006, C. C. A. Fifth Circuit.

Plaintiff's pants rack patent is what is commonly termed "design patent". I can find no essential difference between what is called a design patent or mechanical or engineering or other type of patents with the exception that on design patents the object must be viewed as a whole and especially with reference to ornamentation and its appeal to the eye. Its mechanical or functional properties or uses are not to be considered as an aid to the validation of such patents. In other words, the fact that plaintiff's pants rack revolves and has a three-legged base is of no legal bearing, as admitted by both sides; and the further fact that plaintiff's patented article has some mechanical or utilitarian functions not present in prior art is not in any way determinative or even important in determining its legal patentability.

Plaintiff contends that there is no teaching in the prior art to combine references or to lead an ordinarily capable mechanic to the conception and production of plaintiff's pants rack. To this contention I cannot subscribe.

Appendix—Findings and Report of Special Master

The Special Master has considered not only the entire brief of the plaintiff but also the portion thereof beginning on page 17 of the original brief of the plaintiff being the brief filed after the trial and the cases therein cited, in which it is stated that there can be invention in combining old elements to give new results and a number of cases are cited which have been read, that the mere reassembling or regrouping of old forms or decorations may constitute a patentable design. There are many cases cited by plaintiff, which are highly persuasive, that the combination of old elements in a new design does not negative invention if the new design as a whole makes an impression that is pleasing to the eye.

There must be not a trifling but a substantial and somewhat novel variation of what has gone before and this I do not consider present in the instant case.

It is true that Henry Spitz, President of the defendant companies, admitted that he had never, before seeing plaintiff's pants rack, observed, used, manufactured or distributed a similar revolving pants rack. Of course, Mr. Spitz claimed all though the case that what the plaintiff had done was to copy or imitate prior art or the essential factors involved in prior pants rack and had changed them slightly. Plaintiff has also cited authorities holding that whether the defendant has adopted and copied or imitated plaintiff's design patent should be highly persuasive and the plaintiff has further contended that commercial success is an indication of the novelty and inventiveness of its creation.

The Special Master is particularly impressed with many of the cases cited by the plaintiff and is inclined to agree

with the plaintiff that the equities as a whole preponderate in favor of the plaintiff, and is further inclined to agree with the plaintiff that the defendants' conduct in this case has been somewhat reprehensible and unethical.

The Special Master is compelled to follow the theories in line with cases of either the plaintiff or the defendants and while feeling and being very sympathetic towards the plaintiff and its case and critical of the defendants' conduct in this case, is, nevertheless, persuaded to go along with and follow some of the leading cases cited by the defendants.

It is my opinion and I, therefore, find that while the equities certainly are to some extent in favor of the plaintiff, the law is with the defendants and against the plaintiff and that the plaintiff's case must fail because it does not now hold a legally enforceable or protective patent for the reasons hereinbefore set forth in these findings.

C. A Further Finding as to Unfair Competition:

The plaintiff claims and contends with merit that the defendants copied, imitated, sold and distributed plaintiff's patented pants hanger as their own production and creation.

The defendants contend, on the other hand, that the plaintiff only copied and imitated prior art, or improved the same, all of which was created and produced by the defendants, and being a variation of the exhibits shown in defendants' Exhibits D, E, F and G, and others.

While I would like to make a finding to the contrary on

account of the general equities in this case, I find that the defendants have not been guilty of unfair competition as a matter of law and as a matter of law only.

FINDINGS AS TO DAMAGES:

In view of the above and foregoing findings, I further find that the plaintiff is not entitled to any damages.

RECOMMENDATIONS:

In view of the above and foregoing findings, I recommend that the plaintiff's bill of complaint be dismissed at the cost of the plaintiff.

Costs of the case and deposit was voluntarily made to the Court Reporter, Isidor Bakst, in the amounts as I recall it, of $200.00.

A voluntary advance was made to the Special Master by each side in the amount of $250.00. This was suggested by the parties and not by the Special Master.

The Special Master devoted two full days to hearing evidence in the case and devoted approximately one-half day in studying the case and particularly the pleadings before the case was heard, and the Special Master has devoted approximately five days in reading over part of the testimony and examining the long and involved briefs of the parties and in actual study of a number of the cases.

The Special Master, in view of the time that has been consumed and involved, suggests a total Master's fee allowance of $1,000.00.

It is further suggested and recommended that the costs of the case should be assessed against the plaintiff and this suggestion is made only because the plaintiff is the losing party by these findings and recommendations and not otherwise.

The Special Master feels, however, that if it was within his power and should it be consistent with the rules and the law, he would recommend that the costs be assessed against the defendants.

Respectfully submitted this 15 day of July, 1954.

EDWARD E. FLEMING,
Special Master.

Plaintiff's Exhibit 5

PHOTOPRINT

(Mounted Opposite)

SEL-O-RAK

FULLY PATENTED - TRADE MARK REG

SEL-O-RAK *attracts!* Captures the attention of the *'just looking, thank you'* customer. It transforms dead areas and wasted corners into valuable selling space. Sel-O-Rak decreases your selling time, increases your selling space and multiplies your sales!

EXCLUSIVE MANUFACTURERS AND DISTRIBUTORS

SEL-O-RAK CORPORATION OF AMERICA

2417 N. MIAMI AVE., MIAMI, FLORIDA

DARK PAGE BLEED THRU

increase efficiency

speed up sales

save space

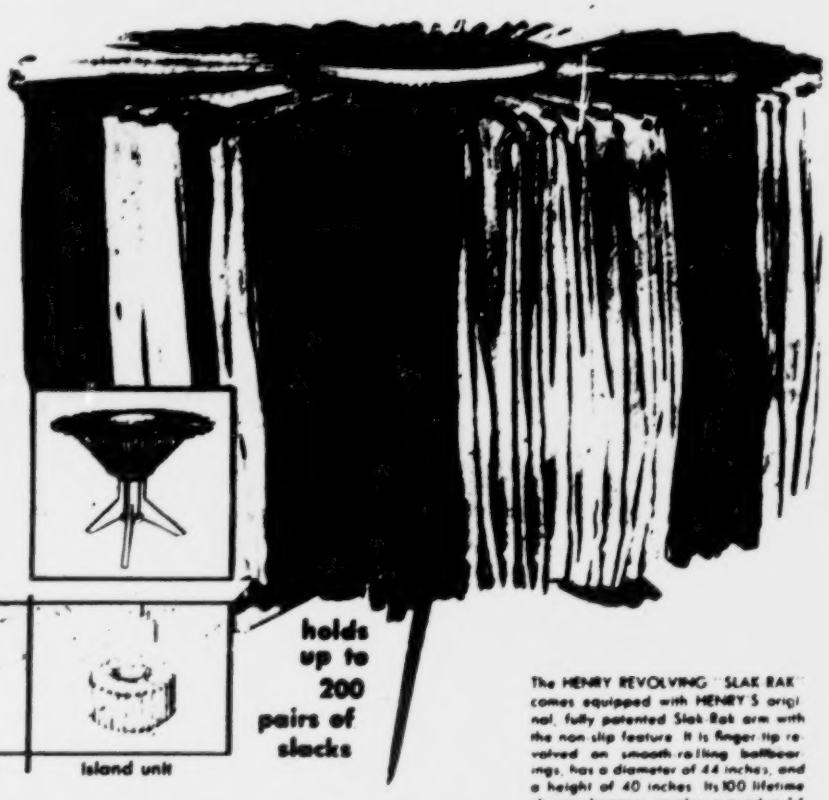
HENRY'S
REVOLVING "SLAK-RAK"

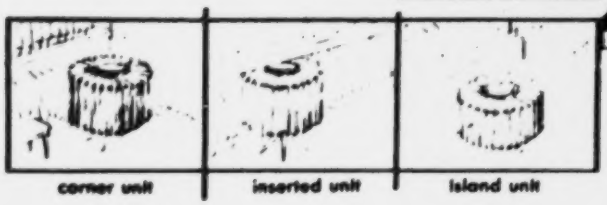
HAS THE SELL-ON-SIGHT APPEAL THAT MOVES MERCHANDISE

Designed for you, after months of research, this amazing new space-saver helps you use up lost floor space while increasing your display area. Self-Service is the keynote as customers stop, look and buy-on-sight.

Revolutionary in concept, the smartly-styled, quality-constructed Henry Revolving "Slak-Rak" will pre-sell your customers while increasing the servicing ability of your salesmen.

$145
F.O.B.
LAWRENCE,
MASS.





corner unit | inserted unit | island unit

holds up to 200 pairs of slacks

The HENRY REVOLVING "SLAK RAK" comes equipped with HENRY'S original, fully patented Slak Rak arm with the non-slip feature. It is finger-tip revolved on smooth-rolling ballbearings, has a diameter of 44 inches, and a height of 40 inches. Its 100 lifetime chrome hangers revolve around a 14 inch center piece specifically designed for display. Standard rack finished in light tan and black enamel. Special finishes to match your interiors at slight additional cost.

Here is the answer to your slack display problems. *Beware of inferior imitations.* Remember—a HENRY product is a QUALITY product

"THE HANGER KING"

the henry hanger & display fixture corp.
of Florida

928 BISCAYNE BLVD. • MIAMI 32, FLA. • TELEPHONES: 82-5097, 9-5538

MAKERS OF RESEARCHED PRODUCTS FOR STORE AND SHOWROOM

6 10M 1 57

APPENDIX

Opinion of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15562

SEL-O-RAK CORPORATION,
Appellant,

—versus—

THE HENRY HANGER AND DISPLAY FIXTURE CORPORATION OF AMERICA, and THE HENRY HANGER AND DISPLAY FIXTURE CORPORATION OF FLORIDA,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(April 18, 1956)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from the judgment of the district court in favor of the appellees as defendants in a suit for infringement of appellant's design

patent, and for damages for unfair competition and an injunction. The court's order was in form of a dismissal of plaintiff's complaint on the merits based upon findings and conclusions of law by a special master, who found the patent infringed if valid, but then found the patent invalid. He also found against the plaintiff's claim for damages for unfair competition, although he criticized the defendants for having openly appropriated plaintiff's design.

In view of the fact that much the greatest number of patent cases deal with "inventions" rather than "design," we think it helpful to begin a discussion of the case with a consideration of the tests as applied to each. These are gathered from the language of the Patent Act.[1] Section 171 of the Act provides:

> "§171. Patents for designs
>
> "Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.
>
> "The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided."

Section 101 of the Act is:

> "§101. Inventions patentable
>
> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement

[1] Title 35, U.S.C.A.

> thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

The parties agree that under the statute providing for design patents there must be invention, newness, originality and ornamental qualities. From these basic principles we turn now to a consideration of the patent and the facts upon which the special master made his findings.

This being a design patent and the quality of ornament being an ingredient, it is believed necessary that a picture of the design be reproduced.[2] From this sketch it is apparent that what the patent office recognized worthy of a patent was a design for a garment display rack which can but inadequately be described as follows: It consists of two drums of wood, one superimposed on the other in such way that the upper drum revolves; attached to the upper drum are trouser hangers which remain rigid and extended for the display of merchandise; attached to the lower drum or cylinder of smaller diameter than the upper, in proper proportion to the size of the entire article, are three vertical fins which, in the shape of a boomerang with convex side out, extend below the lower drum and form legs in the nature of a tripod to hold the rack. The rack as thus constituted is claimed by the appellant, admitted by the appellees in their advertising, and recognized by the court as having a pleasing appearance to the eye.

The appellees are large makers of retail store equipment. They had been making trouser racks for many years for sale to the trade. The design and function of the rack they considered best in the trade for some 19 years, and

---

[2] See Appendix A to this opinion.

which the master found represented the prior art can also be depicted by visual means.[3] As will be seen, here is a single very large drum whose diameter, in relation to the entire article, greatly exceeds the proportion of the drum to total size in the patent design. This drum has rigid extended trouser hangers, as does the patent, but the hangers are separated into four parts by vertical fin walls extending to the base of the hanger. The base itself is a flat circular piece of wood resting flat on the floor. In the ordinary sense of the word there is no similarity in "design" or appearance between the two articles. They do, of course, serve the same functional purpose.

Other relevant facts that stand undisputed in the record are: When appellant obtained its patent by assignment, it furnished appellees with a rack to find purchasers for appellant. Appellees then copied the rack, manufactured it and advertised and sold it to the trade in advertising clearly calculated to claim for appellees the research and inventive skill which they now assert did not exist in the true inventor. These advertisements showed a picture of appellant's rack embodying its patented design and carried in the text such statements about it as "smart-looking" and "designed for you, after months of research," and "amazing, new space-saver," "revolutionary in concept," "smartly styled" and also carried the statement in italics, "BEWARE OF INFERIOR IMITATIONS," thus putting the buying public on notice not to be fooled into buying the rack from the appellant who originated the design.

---

[3] See Appendix B of this opinion.

As commented on by the master, no clearer case of infringement could be shown[4] if the appellant acquired any rights in the design under the patent laws.

In our consideration of the basic question as to the validity of the patent, we start with the knowledge that every design must of necessity embody something old and known. Design being only a rearrangement of line and form, it must always depend upon elements that in a strict sense are old. We are not impressed, therefore, with appellees' attack on the design patent here on the ground that it combined known components. The straight line, the square, the circle, the cube, triangle and sphere are all known components. They are all old. But any design patent, it seems to us, must, of necessity, combine some of these elements. The question is whether the end result is a design for an article of manufacture (1) achieved as a result of inventive skill as contrasted with the natural aptitude of a skilled artisan, (2) is new, (3) and original, (4) and ornamental.

We conclude that the design here meets all of these requirements and that the patent is valid.

First, as to the inventiveness, the statute[5] itself lays down a guide. It says:

> "§103. Conditions for patentability; non-obvious subject matter
>
> "A patent may not be obtained though the invention is not identically disclosed or described as set

---

[4] In fact this is not disputed by appellees if the patent is valid. In their brief before us they say:

> "There has never been any question that defendants copied the rack as made by the plaintiff and it was so conceded on the trial."

[5] 35 U.S.C.A. §103.

forth in Section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

It is of utmost significance here that the appellees themselves considered the design patent possessed of elements that were not "obvious at the time the invention was made to a person having ordinary skill in the art." After having used a trouser rack of their own design as leaders in the field for 20 years, the defendants immediately, upon seeing the article designed and manufactured by appellant, appropriated it and advertised it to the trade as "revolutionary in concept," and as having been "designed for you, after months of research."

Recognizing, as we do, that the validity of a patent is tested by consideration of the statutory purpose as it affects the public as a whole rather than on the basis of the rights or interests of only the parties to specific litigation, we are nevertheless impressed by the recognition thus given to the essential contentions of the inventor by one who has vital commercial interests at stake, and whose attitude may be considered as fairly representing the industry. As was said by the Court of Appeals for the Second Circuit in *Kurtz* v. *Belle Hat Lining Co.*,[6] and quoted approvingly in two decisions of the Fourth Circuit.[7]

---

[6] 280 Fed. 277, 281.

[7] Ackermans v. General Motors Corp. et al, 202 F. 2d 642, and Black and Decker Mfg. Co. v. Baltimore Truck Tire Service Corp., (4 Cir.), 40 F. 2d 910.

> "The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think."

There is expression of a similar thought in *Schenck* v. *Diamond Match Co.*[8] where the court says:

> "The defendants may well be regarded as experts in the art and their conduct was an unbiased and emphatic expression of judgment in favor of the patent; their present expression and that of their experts are probably entitled to less weight."

Moreover, on the issue of invention the failure of appellees to arrive at this design through the many years in which they were making trouser racks for the trade is highly significant. The Supreme Court has indicated the great emphasis to be placed on the failure of one primarily interested in development of the art to come upon the step at issue in determining whether the new step is one which should be obvious to a skilled mechanic, or, as here, skilled designer. In *Krementz* v. *Cottle*[9] the court said:

> "The view of the court below, that Krementz' step in the art was one obvious to any skilled mechanic, is negatived by the conduct of Cottle, the president of the Defendant company . . .
>
> "Yet, skilled as he (Cottle) was with his attention specially turned to the subject, he failed to see,

---

[8] (3 Cir.), 77 Fed. 208.

[9] 148 U. S. 556, 37 L. Ed. 558, 13 S. Ct. 719.

> what Krementz afterwards saw, that a button might be made of one continuous sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength, and requiring less material."

There can be little doubt that the patented design was new and original. The use of a drum in the construction of a trouser hanger was not new, but the design of a drum, small in size proportionate to the overall dimensions, and flowing down into a second cylindrical shaped member with integral tripod legs designed for attractiveness of line and sturdiness of support, created an undeniably new appearance. This, too, was conceded by the appellees in their advertising, in which they called it "amazing new space saver," "revolutionary in concept." This undisputed evidence of newness and originality of the *design* is not rebutted by the fact that the separate elements of a drum of different proportions, of a tripod of unspecified proportions or period, and of a cylindrical support for the upper drum were not new. The design must be considered by the impression it produces as a whole. As we have said in an earlier case, "The design is graceful and pleasing, and while many of its elements were old in allied designing arts, we cannot say that the conclusion of the patent office that there is invention in the combination is shown to be wrong. There is no clear anticipation proven."[10] So, also, the Second Circuit, in *Ashley et al. v. Weeks-Numan Company*[11] said:

> "This court has before said, and now repeats, that the fact that each separate element in a patented design was old does not negative invention,

---

[10] Harris and Schaefer v. Curtiss Aerocar Co., Inc., 69 F. 2d 264.

[11] (2 Cir.), 220 F. 899.

which may reside in the manner in which they are assembled, since it is the design as a whole and the impression it makes on the eye which must be considered."

The Fourth Circuit expressed the same thought in *Glen Raven Knitting Mills* v. *Sanson Hosiery Mills*,[12] where it was said:

> "A combination of elements that are old is patentable, if it produces a new and useful result as the product of the combination; and a design which avails itself of suggestions old in art is patentable if, as a whole, it produces a new and pleasing impression on the aesthetic sense. Matthews & Willard Mfg. Co. v. American Lamp & Brass Co., 3 Cir., 103 F. 634, 639."

As to the requirement of the statute that a design, to be patentable, must be ornamental, once again the defendant below made a pretty good case for the inventor. The advertising called the article "smartly-styled," "smart looking," and said that it had a "sell on sight appeal." No real attack is made by the appellees on the ornamental feature of the design. The test is stated by the Supreme Court in *Gorham Mfg. Co.* v. *White*,[13] where the court says:

> "It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the

---

[12] (4 Cir.), 189 F. 2d 845.

[13] 81 U. S. 511, 29 L. Ed. 731.

> contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, of ornament alone, or of both cojointly, but, in whatever way produced, it is the new thing, or product, which the patent law regards."

We repeat what we said in *Harris and Schaefer* v. *Curtiss Aerocar Co., Inc., supra*:

> "The design is graceful and pleasing, and while many of its elements were old in allied designing arts, we cannot say that the conclusion of the patent office that there is invention in the combination is shown to be wrong."

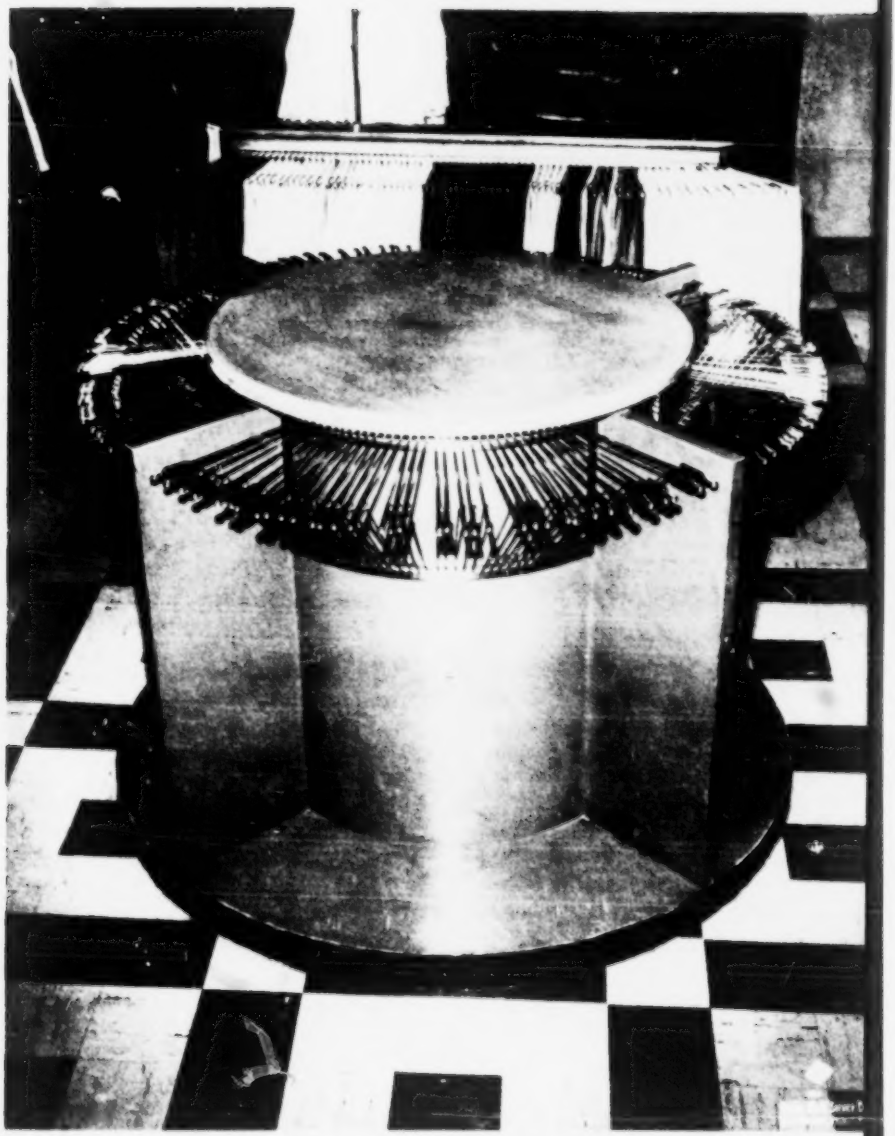
It appears here that the master and the trial court foreclosed appellant's case on the finding that there was no new or different principle involved in the manufactured article than had been present in the drum shaped rack used by the appellees for twenty years, for the master said: "There is no essentially new idea or principle involved in plaintiff's patent from existing prior art other than the fact that it was constructed to rest or be based upon tripod legs." It seems clear that he missed the special test as to the validity of a design patent which, as the Supreme Court says, depends upon the appearance of the manufactured article.

Finding, as we do, that the design here was inventive, new, original and ornamental, and there being no factual issues which give rise to a presumption of correctness of the contrary conclusions of the trial court, we hold that the judgment must be reversed and the case remanded for further and not inconsistent proceedings.

REVERSED and REMANDED.

APPENDIX A

APPENDIX B



SEP 14 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 356

THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF AMERICA, AND THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF FLORIDA, *Petitioners*,

v.

SEL-O-RAK CORPORATION, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(Filed September 13, 1956)

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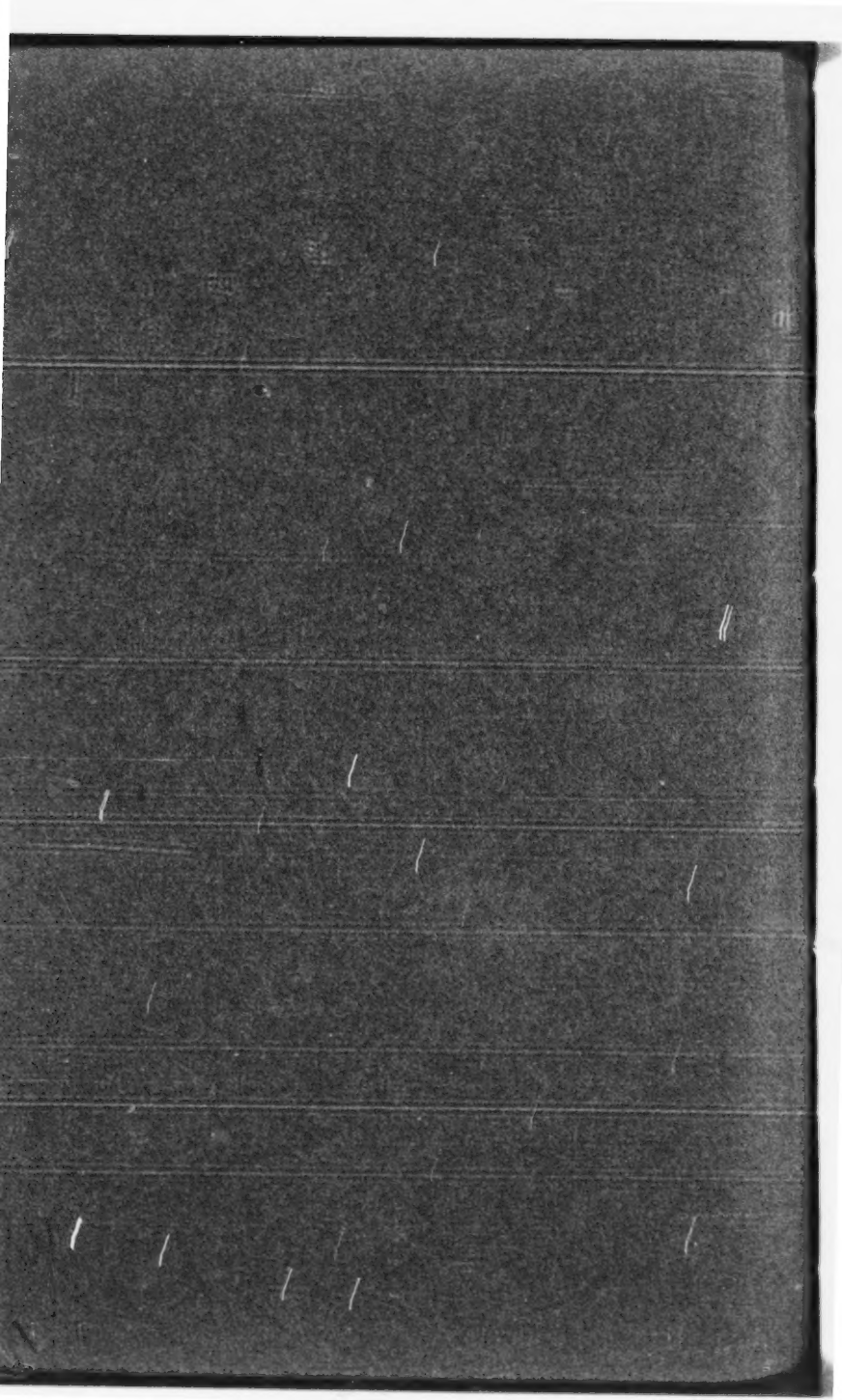


INDEX

Page

The Petitioners' Statement of the Case Is Not Complete 2

There Are No Valid Reasons for Granting the Writ .. 4

The Decision of the Fifth Circuit Court of Appeals Is Not in Conflict With Supreme Court Decisions .. 6

The Decision of the Fifth Circuit Court of Appeals Is Not in Conflict With Other Circuit Court Decisions 13

This Is Not a Case in Which a Court of Appeals Has Rendered a Decision on Important Questions of Federal Law Which May Not Have Been But Should Be Settled by This Court 16

Conclusions 18

AUTHORITIES CITED

Cases

Ashley v. Weeks Newman, 220 F. 899 (CCA 2) 12

Boyle v. Rousso, 16 F. 2d 666 (CCA 8) 12, 15

Diamond Rubber Co. v. Consolidated Rubber Co., 220 U. S. 428 12

Dobson v. Dornan, 118 U. S. 10 6

Forestek Plating & Mfg. Co. v. Knapp Monarch, 106 F. 2d 554 (CCA 6) 13

Franklin Knitting Mills v. Gropper Knitting Mills, 15 F. 2d 375, cert. den., 273 U. S. 61 (CCA 2) 12, 13

Glade v. Walgreen Co., 122 F. 2d 306, cert. den. 314 U. S. 692 15

Gorham Mfg. Co. v. White, 81 U. S. 511 .....6, 12, 18

Great A & P Tea Co. case, 340 U. S. 147 ..... 6, 7

Hopkins v. Waco Products, Inc., 205 F. 2d 221 (CCA 8) 13, 14

Hotchkiss v. Greenwood, 52 U. S. 248 (1850) 17

King Ventilating Co. v. St. James Ventilating Co. et al., 26 F. 2d 357 .....13, 14

Krementz v. Cottle, 148 U. S. 556 12

Page

Loom Co. v. Higgins, 105 U. S. 580 12
Ottuna Box Carloader Co. v. Cristy Box Carloader Co., 215 F. 362 (CCA 8) 15
Pelouse Scale Mfg. Co. v. American Cutlery Co., 102 F. 916 (CCA 7) 15
Sel-O-Rak Corp. v. Henry Hanger & Display Fixture Corp. et al., 232 F. 2d 176 (CCA 5) 2
Smith v. Mid-Continent Inv. Co., 106 F. 2d 622 (CCA 8) 15
Smith v. Whitman Saddle Co., 148 U. S. 674 .....6, 8, 9, 12
Standard Match Corp. v. Bell Machine Co., 83 F. 2d 365 (CCA 7) 15
The Barbed Wire Patent, 143 U. S. 275 12
Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 364 9

STATUTES

35 USC 102 16
35 USC 103 .....16, 17
35 USC 171 .....12, 13, 16
35 USC 282 10

RULE

Supreme Court of the United States—Rule 19 1(b) ... 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 256

THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF AMERICA, AND THE HENRY HANGER AND DISPLAY FIXTURE CORP. OF FLORIDA, *Petitioners*,

v.

SEL-O-RAK CORPORATION, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is a patent case and involves not ony deliberate and wilful infringement of Respondent's patent, but unfair competition including reprehensibe and unethical conduct and piracy and appropriation of the claim of ownership of Respondent's patented design by Petitioners. The facts are not in question. The points of law are simple, clear cut and have been interpreted many times over by this Court.

THE PETITIONERS' STATEMENT OF THE CASE IS NOT COMPLETE

Petitioners' statement of the case is conspicuously devoid of facts and findings unfavorable to the Petitioners.

To illustrate the omission by Petitioners of the facts that led to the initiation of the case at bar, reference is made to the decision below in *Sel-O-Rak Corporation* v. *The Henry Hanger and Display Fixture Corporation of America, et al*, 232 F. 2d 176 (Reprinted in Petitioners' appendix pages 23A-33A), where Judge Tuttle, summarizing the facts found by the Master at trial said (Pet. p. 26A, 28A):

> "Other relevant facts that stand undisputed in the record are: When Appellant obtained its patent by assignment, it furnished Appellees with a rack to find purchasers for Appellant. Appellees then copied the rack, manufactured it and advertised and sold it to the trade in advertising clearly calculated to claim for Appellees the research and inventve skill which they now assert did not exist in the true inventor.
>
> . . . After having used a trouser rack of their own design as leaders in the field for 20 years, the defendants immediately upon seeing the article designed and manufactured by appellant, appropriated it and advertised it to the trade as 'revolutionary in concept,' and as having been 'designed for you, after months of reseach'."

The Fifth Circuit Court of Appeals after carefully considering the lengthy report of the Special Master; after hearing argument by Petitioners and Respondent; after personally observing and examining respondents' patented rack and a life-size photographic

reproduction of the principal prior art claimed as anticipation; and with voluminous briefs, records, and exhibits before them, found the patent in suit valid, stating (Pet. p. 27A):

> ". . . The question is whether the end result is a design for an article of manufacture (1) achieved as a result of inventive skill as contrasted with the natural aptitude of a skilled artisan, (2) is new, (3) and original, (4) and ornamental.
>
> "We conclude that the design here meets all of these requirements and that the patent is valid."

The facts as to unfair competition are undisputed in the Record. The Master found (Pet. p. 16A), "The plaintiff (Respondent) claims and contends with merit that the defendants (Petitioners) copied, imitated, sold and distributed plaintiff's (Respondent's) patented pants hanger as their own production and creation." The Master was so strongly impressed with the equities of this case being in favor of the Plaintiff (Respondent), and with the unfair competition by the Defendants (Petitioners), that he recommended that if it were within his power the costs would be assessed against the Defendants (Petitioners); but because the Master held for the Defendants (Petitioners) on validity, he suggested that the costs be assessed against the Plaintiff (Respondent). (See Pet. p. 18A)

The District Court being impressed by the findings of the Special Master with respect to the facts of unfair competiton and the piratical acts and conduct of the Defendants (Petitioners) did not adopt the suggestion that the total costs be assessed against the Plaintiff (Respondent) but, in part, adopted the recommendation that costs be assessed against the

Defendants (Petitioners) by ruling that the costs be shared between the parties.

The only reason that the Special Master and later the District Court did not find the defendants (Petitioners) guilty of unfair competition was because of the finding that the patent in suit was invalid. However, after careful consideration the Fifth Circuit Court of Appeals reversed the District Court and said (Pet. p. 33A):

> "Finding, as we do, that the design here was inventive, new, original and ornamental, and there being no factual issues which give rise to a presumption of correctness of the contrary conclusions of the trial court, we hold that the judgment must be reversed and the case remanded for further and not inconsistent proceedings."

It is clear that by this action the Court of Appeals intended that the District Court consider the unfair competition by the defendants (Petitioners) in further proceedings before the District Court.

THERE ARE NO VALID REASONS FOR GRANTING THE WRIT

The unhappy petitioners faced with the prospect of accounting for their "unethical and reprehensible" conduct (R. 56), have petitioned for a Writ of Certiorari on the basis that the Supreme Court review questions of undisputable fact and questions of law already interpreted by this Court and followed by the lower courts.

The petitioners' questions may be stated in a single question: Did the Fifth Circuit Court of Appeals err in finding the patent valid?

The District Court below merely affirmed the Master's report without rendering a written opinion or setting forth findings of fact and conclusions of law. Petitioners loudly proclaim the thoroughness and completeness of the Master's report in deciding for them. However, petitioners fail to bring to this Court's attention the Master's lack of conviction in his own findings on the question of validity evidenced when he stated in his report to the District Court (Rec. 48):

> "I realize and so state in view of the next finding (on the question of validity) that the above findings (infringement and piratical acts of Defendants-Petitioners) are irrelevant and immaterial but they have been made because the Special Master realizes that he may be reversed on the next findings."

The Master was in fact reversed by the Fifth Circuit Court of Appeals in a complete and comprehensive opinion.

The Petitioners now assert that the decision rendered by the Fifth Circuit Court affects important questions of Federal law. However, this is a simple case involving patent infringement and private litigants in a very limited field, and includes no questions deserving the dignity of review by this Court.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH SUPREME COURT DECISIONS

I.

Petitioners, attempting to parallel the facts of this case with the facts of the *Great A & P Tea Company* case, 340 U.S. 147, and the *Smith* v. *Whitman Saddle Company* case, 148 U.S. 674, repeatedly disregard the basic concepts set forth by this Court for determining the conditions of patentability in designs.

Petitioners improperly insist on separating the design into its component elements; then, by culling from the prior art, elements of the combination in suit, attempt to show that the design is not new.

In *Gorham* v. *White*, 81 U.S. 511, and *Dobson* v. *Dornan*, 118 U.S. 10, this Court established the foundation of design patent law. These cases held that, in determining validity of design patents, the design cannot be separated into its component parts as petitioners repeatedly suggest, but must be viewed as a whole as to *appearance*.

In *Gorham* v. *White*, supra, this Court stated:

> "It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency cause, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense."

In *Dobson* v. *Dornan*, supra, this Court further stated:

> "Undoubtedly the claim in this case covers the design as a whole and not any part and it is to be tested as a whole as to novelty an invention."

The Court below, in determining the question of validity, followed the law of this Court when they said, (Pet. p. 30A):

> ". . .The design must be considered by the impression it produces as a whole."

The Court further stated, (Pet. p. 27A):

> "In our consideration of the basic question as to the validity of the patent, we start with the knowledge that every design must of necessity embody something old and known. Design being only a rearrangement of line and form, it must always depend upon elements that in a strict sense are old. We are not impressed, therefore, with appellees attack on the design patent here on the ground that it combined known components. The straight line, the square, the circle, the cube, triangle and sphere are all known components. They are all old. But any design patent, it seems to us, must of necessity combine some of these elements."

II.

Petitioners' assertion that the *Great A & P Tea Company* case, supra, is controlling in this case is misleading. There is no connection or similarity between the two cases.

The issues in the *Great A & P Tea Company* case was the construction of the claims. As stated by Justice Jackson:

> "Since the courts below perceived invention only in the extension of the counter, we must first determine whether they were right in so doing . . . In the first place the extension is not mentioned in the claims except by a construction too strained to be consistent with the clarity required of claims

> which define the boundaries of a patent monopoly . . . In the second place, were we to treat the extension as adequately disclosed, it would not amount to an invention. We need not go so far as to say that invention never can reside in mere change in dimensions of an old device, but certainly it cannot in mere elongation of a merchant's counter, a contrivance which, time out of mind, has been of whatever length suited the merchant's needs . . . In the third place, if the extension itself were conceded to be a patentable improvement of the counter, and the claims were construed to include it, the patent would nevertheless be invalid by overclaiming the invention by including old elements, unless, together with its other old elements, the extension made up a new combination patentable as such."

The issue in the present case was the determination of the presence of ornamentation, originality, novelty and invention in the design.

III.

In the *Smith* v. *Whitman Saddle Company*, case, supra, the Supreme Court held that the difference between the patented device and the alleged infringing device was sufficient to avoid infringement. The lower court's finding, that the design patent was valid, was not disturbed by this Court. Petitioners, by quoting out of context, (page 10 of the Petition) have given a meaning to the language of the Supreme Court that never was intended. In fact, the first half of the quotation, attributed to the *Smith* v. *Whitman Saddle Company* case, was not even made by the Supreme Court but by a District Court Judge in a case involving a cheese safe.

The second half of this question was taken out of context from the following:

> ". . . a person cannot be permitted to select an existing form, and simply put it to a new use anymore than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty, and the result is in effect a new creation, the design may be patentable."

Again on page 19 of the Petition, petitioners attribute another statement to the Supreme Court in the *Smith* v. *Whitman Saddle Company*, case that was actually made by the District Court Judge in the case involving the cheese safe.

Using the same tack, petitioners, on page 12, line 17, again quote out of context in such manner as to completely reverse the intended meaning of the Court below. The complete quotation is, (Pet. p. 30A):

> ". . . This undisputed evidence of newness and originality of the *design* is not rebutted by the fact that the separate elements of a drum of different proportions of a tripod of unspecified proportions or period, and of a cylindrical support for the upper drum were not new." (emphasis supplied by the Court)

See also *Williams Mfg. Co.* v. *United Shoe Machinery Corporation*, (1942) 316 U.S. 364.

Had Petitioners, as they suggest in the first full paragraph on page 20 of the Petition, in their actual manufacture and sale, combined the prior art by placing Petitioners' old rack on top of a Duncan Phyfe leg, this litigaton would never have been instituted.

But, Petitioners did not follow the prior art as was their right. Instead, in a calculated, wilful and deliberate manner, and with unethical and reprehensible conduct, they appropriated respondent's patented design. Their subsequent defense that the patent was invalid could not be maintained and should not now be reviewed by this Court.

Petitioners, embarrassed by their wholehearted praise of Respondent's invention, and their exact imitation and appropriation of Respondent's design, and their unfair competition, and being unable to mitigate the import of their "reprehensible and unethical conduct", now question the discretion of the Fifth Circuit Court of Appeals in making reference to these undisputed facts.

Petitioners allege that aside from the advertising by Petitioners, which praises the patented design, and aside from the fact that Petitioners abandoned their own old designs and appropriated Respondent's new design, there was "no other proof of record relied upon by the Circuit Court for its determination that invention was present in Respondent's design".

It would appear that the Petitioners are attempting to place the burden of showing validity on the Respondent when, in reality, the burden of showing invalidity weighs heavily on the Petitioners as set forth in 35 U.S.C. Section 282.

In this case, there are no facts to show or prove the patent to be invalid. The only witness relied upon by the petitioners in the attempt to prove invalidity was an expert in the field who testified when comparing the patented rack with the principal prior art: (R. 299)

> "I mean there is no similarity. It is completely different. Other than the fact it is circular there is no similarity there."

The Fifth Circuit Court, after a careful review of the record, realized the lack of proof presented to substantiate the defense of invalidity; and stated (Pet. p. 33A):

> "Finding, as we do, that the design here was inventive, new, original and ornamental, and there being no factual issues which give rise to a presumption of correctness to the contrary conclusions of the trial court, we hold that the judgment must be reversed . . ."

In the absence of any factual issues to show invalidity, the court below was following accepted judicial thinking in making reference to the activities of the Petitioners in advertising and imitating the patented design. As stated by Judge Tuttle (Pet. p. 28A):

> "It is of utmost significance here that the appellees themselves considered the design patent possessed of elements that were not 'obvious at the time the invention was made to a person having ordinary skill in the art'. After having used a trouser rack of their design as leaders in the field for 20 years, the defendants immediately, upon seeing the article designed and manufactured by the appellant, appropriated it and advertised it to the trade as 'revolutionary in concept', and as having been 'designed for you, after months of research'.
>
> "Recognizing, as we do, that the validity of a patent is tested by consideration of the statutory purpose as it affects the public as a whole rather than on the basis of the rights or interests of only

> parties to specific litigation, we are nevertheless impressed by the recognition thus given to the essential contentions of the inventor by one who had vital commercial interest at stake, and whose attitude may be considered as fairly representing the industry."

See *Krementz* v. *Cottle*, 148 U.S. 556; *Diamond Rubber Co.* v. *Consolidated Rubber Co.*, 220 U.S. 428; *The Barbed Wire Patent*, 143 U.S. 275; *Loom Co.* v. *Higgins*, 105 U.S. 580.

IV.

Petitioners have gone far afield when they seek to have this Court review this case on certiorari because of the alleged unreal factual issue that functional features are present in Respondent's design and on the further allegation that the design is obscured during use.

Statute 35 USC 171 requires that a design to be patentable must be applied to an article of manufacture. By far the vast majority of designs relate to articles of manufacture that also have a functional purpose. See *Ashley* v. *Weeks Newman*, 220 F. 899 (CCA 2); *Boyle* v. *Rousso*, 16 F. 2d 666 (CCA 8); *Franklin Knitting Mills* v. *Gropper Knitting Mills*, 15 F. 2d 375, cert. den., 273 U.S. 61 (CCA 2).

As found by this Court in *Gorham* v. *White*, supra, and quoted later in *Smith* v. *Whitman Saddle*, supra:

> "The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, and enlarge the demand for it, and may be a meritorious service to the public."

Thus the design must appeal to the purhaser in such a manner as to increase the desire for the article, there-

by increasing its salable value. See *Forestek Plating and Mfg. Co.* v. *Knapp Monarch*, 106 F. 2d 554 (CCA 6). The trade to whom the sale of the patented article in the instant case is directed, buy the article for its unique design without garments as admitted by petitioners in their advertising, (Pet. 20A), and as recognized by the Court below. See also *Franklin Knitting Mills* v. *Gropper Knitting Mills*, supra.

Petitioner's contention that a design, to be patentable must be patentable as a design, rather than the design for an article of manufacture, such as a pants rack, is clearly in contradiction to Title 35 USC 171 of the new Patent Act. In fact, according to Section 171, a design is not patentable unless it is applied to an article of manufacture. The Court below followed this authority.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS

Petitioners insist that the "approach" of the court below in deciding for the respondent is in conflict with the "approaches" of the Seventh Circuit in the case of *King Ventilating Co.* v. *St. James Ventilating Co.*, et al. 26 F. 2d 357, and the Eighth Circuit in the case of *Hopkins* v. *Waco Products, Inc.*, 205 F. 2d 221. Without admitting that the court below took any different approach than that taken by the various Circuit Courts, Respondent contends that different "approaches" by different Circuit Courts does not constitute a valid reason for granting certiorari. As stated in Supreme Court rule 19 1 (b), it is a conflict in "decisions" between different circuit courts of appeal in the "same matter" which warrants review by certiorari.

As a matter of fact the facts in the *King Ventilating Co.* case supra, are completely different than in the present case. In that case Louie Klima, the patentee, worked for the Queen Cupola Co. prior to 1910 which sold cupolas as illustrated in appendix A. In 1913 Louie Klima became general manager of appellant company, King Ventilating Co., which manufactured a cupola as shown in appendix B. In 1917 Louie Klima filed an application for a patent on a cupola as shown in appendix C.

It is immediately obvious from a cursory examination of these three exhibits that the designs are nearly identical. The only difference in the designs is the slight flare in the base of the patented device which actually does not add any significant design feature to the overall appearance of the cupola shown therein. Invention was never really a major issue in the King Ventilating case, since the patented design was clearly anticipated by the prior art and therefore failed to meet the statutory condition of novelty.

No such facts exist in the present case as petitioners would have this Court believe. As found by the Fifth Circuit Court (Pet. p. 30A):

> "There can be little doubt that the patented design was new and original."

In the Seventh Circuit decision in *Hopkins* v. *Waco Products Inc.*, supra, there is again no conflict with the Fifth Circuit in the present case since the facts in that case were also different.

The patented article was a design for a luggage rack, see appendix D. In the decision the court held that

the single feature distinguishing this luggage rack from the prior art was the wall guard, and both courts below conclusively found, as a matter of fact, that the wall guard was entirely functional in its use as well as its construction.

In the present case Judges Tuttle, Cameron and Jones, after viewing the actual patented article, alongside a life size photographic reproduction of the principal prior art, relied on as anticipation, found (Pet. p. 30A):

> "There can be little doubt that the patented design was new or original. The use of a drum in the construction of trouser hanger was not new, but the design of a drum, small in size proportionate to the overall dimensions, and flowing down into a second cylindrical shaped member with integral tripod legs designed for attractiveness of line and sturdiness of support created an undeniably new appearance."

Notwithstanding the Petitioners' comments to the contrary, the Seventh and Eighth Circuit Courts of Appeal have consistently held with the Fifth Circuit that invention can be present in a combination of all new elements, of some new elements and some old elements, and of all old elements, providing there was invention in the combination and a new result obtained of a patentable nature. See *Pelouse Scale Mfg. Co.* v. *American Cutlery Co.*, 102 F. 916 (CCA 7); *Standard Match Corp.* v. *Bell Machine Co.*, 83 F. 2d 365 (CCA 7); *Glade* v. *Walgreen Co.*, 122 F. 2d 306, cert. den. 314 U.S. 692 (CCA 7); *Boyle* v. *Russo*, 16 F. 2d 666 (CCA 8); *Ottuna Box Carloader Co.* v. *Cristy Box Carloader Co.*, 215 F. 362 (CCA 8); *Smith* v. *Mid-Continent Inv. Co.*, 106 F. 2d 622 (CCA 8).

THIS IS NOT A CASE IN WHICH A COURT OF APPEALS HAS RENDERED A DECISION ON IMPORTANT QUESTIONS OF FEDERAL LAW WHICH MAY NOT HAVE BEEN BUT SHOULD BE SETTLED BY THIS COURT

The petitioners, in a last ditch effort to induce this Court to review this case, suggest that "the nature and significance of the questions herein raised justify the granting of the writ for the purpose of final determination of those issues by this Court." The issues on which the petitioners seek review relate to "novelty" and "invention". These issues have been clearly established in numerous cases decided by this Court.

The statutory requirements for design patentability are (35 USC 171):

(1) Invention

(2) Novelty and originality

(3) Ornamentality

Novelty and invention in designs, and novelty and invention in utility patents are governed by the same statutes, that is:

(1) 35 U.S.C. 102, Conditions for patentability, novelty and loss of right to patent, and

(2) 35 U.S.C. 103, Conditions for patentability, non-obvious subject matter.

Thus in determining patentability for designs, novelty and invention are considered in the same light and based on the same laws as novelty and invention in utility patents. The Fifth Circuit Court of Appeals in finding that "invention" was present in respondent's design followed the law of this Court relating to inventor and positively determined that the statutory test

for patentability (35 U.S.C. 103) had been satisfied in that the differences between the subject matter sought to be patented and the prior art were not obvious at the time the invention was made to one skilled in the art. This statutory test for invention has been applied by this Court in cases dating back to *Hotchkiss* v. *Greenwood*, 52 U.S. 248 (1850).

"Novelty" of Respondent's design was never really challenged by the Petitioners and was actually assented to by the Petitioners in their advertising (Pet. p. 21A) and by the testimony of their witnesses (R. p. 299). The Master also recognized novelty in Respondent's design finding this to be a fact (R. pp. 211, 212).

The petitioners further suggest that since this Court has not rendered a recent opinion on a design patent case, this is reason enough for granting the petition. However, in order for this Court to review a case there must be some issue in question. There are no issues in question here. This is a simple case and the issues of novelty and invention have been clearly decided by the Fifth Circuit Court in accordance with long established principles of law laid down by this Court. It would appear that the petitioners having been called to account for their unscrupulous activities; their unfair competitive practices; their pirating and appropriating of the respondent's design; their statements in national advertising warning the trade to 'BEWARE OF INFERIOR IMMITATIONS', thus putting the buying public on notice not to be fooled into buying the rack from the appellant (respondent) who originated the design." (Pet. p. 26A); and for their statements in advertising "clearly calculated to claim for appellees (petitioners) the research and inventive skill which they now assert did not exist in the true inventor."

(Pet. p. 26A); are now seeking reconsideration of well settled issues of patent law in a desperate effort to persuade this Court to review this case.

Since this Court has clearly established the law on novelty and invention which the Fifth Circuit followed, and since this Court has clearly established the test for ornamentality (see *Gorham* v. *White*, supra) which the Fifth Circuit followed, there is not here present an important question of Federal law which remains to be settled by this Court.

CONCLUSIONS

Since this is a suit between private parties resulting from patent infringement;

Since the court below was in the same position as the Master at trial to evaluate the exhibits;

Since the court below followed the law of the Supreme Court in resolving every issue in this case;

Since the decision of the court below is not in conflict with the decisions of other circuits on similar issues;

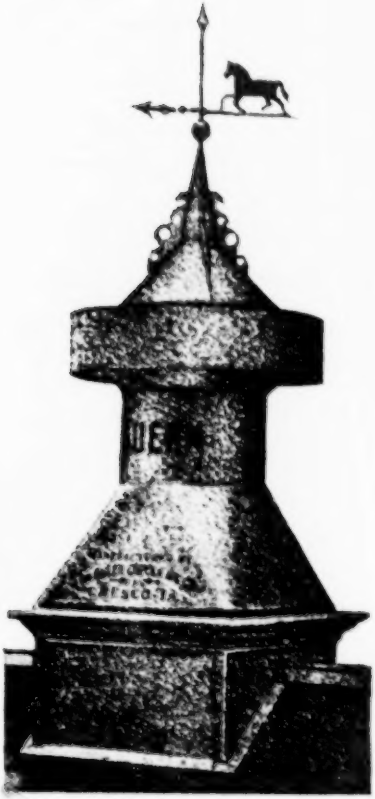
Since the court below did not decide an important question of Federal law which has not been settled by this Court;

Certiorari should be denied.

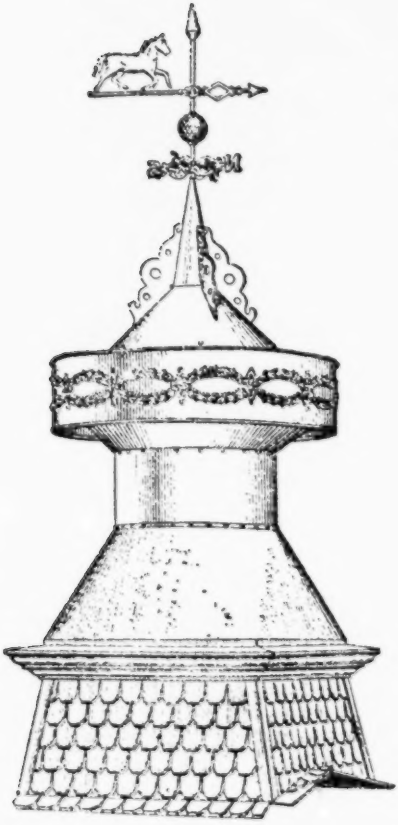
Respectfully submitted,

LEONARD MICHAELSON
KARL W. FLOCKS
JACK A. ABBOTT
Attorneys for Respondent

APPENDIX A



APPENDIX B



APPENDIX C

Nov. 15, 1949 E. F. HOPKINS Des. 156,008

BAGGAGE RACK

Filed April 23, 1947

Fig. 1

Fig. 2

INVENTOR.
Earl F. Hopkins.
BY
Carl F. Burnett Atty.